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IS A PUBLIC CARRIER, GIVEN POWER BY STATUTE TO LEASE ITS FRANCHISE, EXEMPTED FROM LIABILITY FOR INJURIES RESULTING FROM THE NEGLIGENCE OF THE LESSEE COMPANY?

In the face of considerable public disapproval the court of appeals and Supreme Court of Missouri have just decided in the recent decision of the supreme court in the case of Moorshead v. United Railways Company, decided Feb. 21, 1907, that a street railway company which leases its lines to another company is not liable for injuries resulting from the negligence of the lessee company. This decision has resulted in rendering nugatory judgments for personal injuries to an amount equaling almost a million dollars, which fact is mainly the source of inspiration for whatever of bitter public disapproval has been expressed.

The Missouri Court of Appeals decided this question June 5, 1906, by a divided court, in the case of Moorshead v. United Railways Co., 96 S. W. Rep. 261, in which Judge Goode rendered such an able opinion that we were tempted to publish it in full, although contrary to our usual practice where cases are certified to a higher court, as occurred in this case. The supreme court however in the opinion just handed down adopts without reserve the opinion of Justice Goode and make it the law of that state.

The facts which went to make up this extraordinary case disclosed that on October 1, 1899, the United Railways Company, owning in fee simple practically all of the street car lines of the city of St. Louis, leased with the consent of the city all of its property and franchises to a company incorporated as the St. Louis Transit Company, on an agreement by the latter to pay all the fixed charges and expenses, and a rental equal to $5.00 per share on all the preferred capital stock of the United Railways Company. The lessee company took possession under its lease, but in a few years became so involved financially as to be unable to carry out the terms of the lease which it thereupon voluntarily surrendered to the lessor, the United Railways Company, defendant in the principal case, leaving hundreds of judgment creditors unsatisfied.

After a most searching analysis of the authorities, and a most masterful classification, Justice Goode was in a position to give expression to what we regard as the most satisfactory statement of a question of law so often confused by counsel, text-writer and judge. Justice Goode says: "All courts agree that in the absence of a statute, a lease of its property and franchises by a railway company, does not relieve it of its public duties and responsibilities, and that the lessor remains liable for the torts of the lessee. In other words, there is no common law authority for such leasing by railroad companies; that at least in so far as the contract impairs the right of the public to hold the lessor answerable for the proper discharge of the duties it assumed in consideration of the powers granted to it by the sovereignty. Railway Co. v. Brown 17 Wall. (U. S.) 445, 21 L. Ed. 675; Thomas v. Railroad, 101 U. S. 71, 25 L. Ed. 950; Chollette v. Same, 26 Neb. 159, 41 N. W. Rep. 1106, 4 L. R. A. 135; Muntz v. Same (La.), 35 So. Rep. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495. Before going into a discussion of the question on principle, it is well to classify the adjudications, so that those directly in point may be studied more readily, and those wherein the proposition affirmed is not identical with the one involved here may have attached to them the value they merit as containing the lucubrations of judges on the general question and not treated as precedents on the exact question before us. When the lease is authorized by statute, the leasing company, of course, remains liable for the acts of the lessee if the statute says it shall. Smith v. Railroad, 61 Mo. 17; Markey v. Railroad, 185 Mo. 348, 84 S. W. Rep. 61; Main v. Same, 18 Mo. App. 388; Brown v. Same, 27 Mo. App. 396; McCoy v. Same, 36 Mo. App. 445; Quested v. Railroad, 127 Mass. 204; Daniels v. Hart, Treas., 118 Mass. 543; Bower v. Railroad, 42 Iowa, 546; Whitney v. Railroad, 44 Me. 362, 69 Am. Dec. 103; Stearns v. Railroad, 46 Me. 95. When the statute aut orizes the leasing, but says nothing as to whether the lessor shall remain liable, a few courts hold that nevertheless the lessor is liable as fully as the lessee itself would

be for the latter's tortious acts; and, in pursuance of this extreme view, these courts have held the leasing company liable for negligent injuries inflicted by the lessee on its own servants. Chicago, etc., R. R. v. Hart, 209 Ill. 414, 70 N. E. Rep. 654, 66 L. R. A. 75; Logan v. Railroad Co., 116 N. Car. 940, 21 S. E. Rep. 959; Harden v. Same, 129 N. Car. 354, 40 S. E. Rep. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; Singleton v. Same, 70 Ga. 464, 48 Am. Rep. 574; Bank v. Same, 25 S. Car. 216; Hart v. Same, 33 S. Car. 427, 12 S. E. Rep. 9, 10 L. R. A. 794. In the case last cited the court went so far as to hold the lessor liable in punitive damages for the wrongful conduct of the lessee. The doctrine of other tribunals is that the leasing company remains liable to third persons for an injury received because of the improper construction or bad repair of the roadbed, station houses, or other real property, on the ground that it was the peremptory duty of the lessor to maintain its properties in good condition for the use of the general public, including as part of the public the servants of the leasing company. Lee v. Railroad, 116 Cal. 97, 47 Pac. Rep. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140. In certain cases which maintained the doctrine that the lessor is not exonerated by a statutory lease from responsibility for the wrong performance by the lessee of any charter power or duty, it is held that the safe operation of cars and trains on which passengers are carried is a charter duty. Railway Co. v. Culberson, 72 Tex. 375, 10 S. W. Rep. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805. There are cases wherein the general principle that the leasing company remains responsible for the proper performance of its charter duties is adhered to, but the operation of trains and cars is declared not to be one of those duties. Mahoney v. Railroad, 63 Me. 68; and note to Ohio, etc., R. R. v. Dunbar (Ill.), 71 Am. Dec. 291, wherein, on page 297, it is said that a case holding the contrary does not accord with sound principle or authority. Other decisions repudiate these various distinctions as of no importance, and ground the nonliability of the lessor on the grant of statutory power to make a lease, holding that this imports a lease with all the usual incidents and consequences of that sort of a contract, one of which is that if the property is in safe and good condition when turned over to the lessee, the lessor is not responsible for subsequent injuries arising from its bad repair. Fisher v. Railroad, 34 Hun (N. Y.), 433; Miller v. Railroad, 125 N. Y. 118, 26 N. E. Rep. 35."

After animadverting sententiously upon the divergence of opinion existing even among courts holding to the same general rule, Justice Goode points out that the reasons often given by courts holding the lessor liable for the negligence of the lessee, are very remote and altogether beside the mark. Justice Goode says: "Opinions holding the lessor liable for the torts of the lessee, when the leasing is authorized by statute, leave the impression that the courts lay hold of various general rules of corporation law having very remote bearing on the immediate question, in order to enforce what the deciding tribunal happens to think would be a salutary rule. Much stress is laid on the fact that the corporation is an artificial, instead of a natural, person and derives its powers from the state. How this dogma can restrict the right of a railway company to lease its property when the statute gives the right in unqualified terms, is not easy to perceive. The proposition that a railway company is bound to perform all its charter duties, and all its primary duties to the public, whether imposed by the charter or the common law, is sound. But the proposition that the legislature may authorize it to transfer to any other company by lease the performance of those duties is equally sound. The mischief which it is supposed would result if leasing railway companies are not held responsible for torts, in that leases to irresponsible companies would be made for the purpose of evading liabilities, is met by the answer, that, if that was the intention, on proof of the fact, the lease would be disregarded like any other fraudulent conveyance, and the lessor held responsible."

"Public policy" is often given as a reason by courts opposing the rule announced by the court in the principal case, but Judge Goode is there with an answer to this "final resort" of an enemy crowded to the wall by the sheer force of his powerful argument. Judge Goode says: "But it is said that the true public purpose is to permit the lease but hold the leasing company answerable for the torts of the lessee. Inasmuch as there is legislation on the subject, the policy of the state

must, as said, be derived from the enacted laws. If it appears on a fair interpretation of the statutes authorizing the leasing that the legislature contemplated a continuance of the liability of the lessor, the law should be so declared; but if it appears that the legislature did not construe this liability against the leasing company, but authorizes leases of street railway properties with all the legal effects pertaining to lease contracts at common law, then the courts have no right to partially annul the legislative intention, or engraft on the law an exception in the interest of what they believe would be good policy. This whole question is not one of public policy at all but of legislative intention—of statutory construction. The public policy notion misconceives and misses the essential inquiry."

Finally, after clearing away the rubbish of confused case-law and its more confusing theories advanced to maintain an untenable position, Judge Goode shows clearly that the whole question is purely one of legislative construction, divorced from any question of public policy or peculiar corporate responsibility, closing his very erudite and valuable opinion with the following observations on the facts in the principal case: "We have a statute broadly authorizing contracts like the one before us and the primary inquiry is whether or not the statute discloses an intention on the part of the legislature to hold the leasing company responsible for torts after the lease is executed and the property transferred. The first rule for the interpretation of statutes is that their meaning must be collected if possible from the language used. Of course, if a certain interpretation would lead to absurd or iniquitous results, it will not be adopted unless compelled by the language. We may allow, therefore, that the court may take into consideration what it believes would be for the common weal to this extent, namely, that if one construction would be mischievous and another beneficial, and the language of the enactment permits either to be adopted, the salutary one will be preserved. The statute with which we are dealing authorizes any railway company to purchase, lease, or acquire by other lawful contract, all the franchises and property of every description belonging to any other street railway corporation, including the stock and bonds of the latter, and further authorizes the purchasing or leasing company to hold, use, and operate the railway leased. The statute further authorizes any street railway company to sell, lease or dispose of by any other lawful contract, to another company, its railroad rights and franchises, including the right to be a corporation, and all and singular its other properties of every description. We remark emphatically that as the legislature granted street railway companies the power to dispose of their franchise to be a corporation, it could never have been the intention to hold such companies responsible for the acts of a company acquiring the franchises. When a company disposes of its right to be a corporation, it practically passes out of existence, and cannot be held responsible in any legal method which occurs to us. Moreover a company is authorized by said lease or other lawful contract, to dispose of all its property, which shows that the law-making body did not expect it to still stand responsible for the acts of the vendee, for how could it be held responsible after all its property was gone? But it is argued that those provisions take effect only in the case of sales. The words of the statute are 'to sell, lease or dispose of by any other lawful contract.' Take the instance of a lease for a long term of years, covering all the leasing company's property of every kind and character; in what way would it be practicable to collect judgments from such a company? It is true the reversion of the property might be sold under execution, but that would be of very little value to the purchaser if it was under an unexpired term longer than an ordinary lifetime. To our minds, it is palpable from the statute itself, that the legislature never thought of holding the leasing company answerable for the torts of the lessee. It fully intended to make the latter responsible; at least for all torts occurring in the operation of the road. Moreover, it is repugnant to every principle of law or justice to hold one person or company responsible for the negligence of another which it had no power to prevent. The statute empowers the lessee company to operate the road, and unless the power of control is reserved by the lessor in the lease, the operation will be without any interference by the lessor. Could the legislature expect that, in that contingency, the lessor should stand answerable for negligent torts? To so hold would largely annihilate the privileges granted by the statute—would frustrate the purpose of the lawmaking body."

NOTES OF IMPORTANT DECISIONS.

FOREIGN CORPORATIONS — THOUGH CONTRACTS MADE WITH FOREIGN CORPORATIONS ARE HELD TO BE VOID, WHERE THEY HAVE NOT COMPLIED WITH STATUTORY REQUIREMENTS YET THEY MAY RECOVER PROPERTY PARTED WITH.—In a recent editorial entitled, "Something of Interest Regarding Statutes Requiring Foreign Corporations to Comply Therewith," we pointed out what seemed to us a very bad decision by the Supreme Court of Missouri. It is found in Tri-State, etc. v. Forest Park Highlands, etc., Co., 192 Mo. 404. In a decision of very recent date the supreme court makes a laudable effort to overturn much of the evil growing out of the Tri-State case, and practically accomplishes its purpose. While we think the wise thing would have been to have absolutely overturned the Tri-State case and gotten back to the basis of Carson, Rand Co. v. Stern, yet this opinion relieves the situation and is a widespread and very important opinion. The opinion is by Judge Woodson and was submitted on an agreed state of facts. The title is Roeder v. Robertson, not yet reported. As this case came to us after this number of the Journal was made up, we could not find room for but a part of the case which we have been compelled to hurriedly pick from the opinion, but at some future date will more fully present. The agreed statement of facts is as follows:

"It is admitted for the purposes of the trial of this cause that the defendants purchased, in or about the month of August, 1896, a threshing outfit, consisting of one sixteen horse-power Stevens & Son traction engine, number 2157; one new Stevens thresher, number 9087; one Uncle Tom's wind stacker, number 208; one self-feeder, number 273, and one Washington weigher, for which defendants promised and agreed to pay said A. W. Stevens & Son twenty-five hundred and eighty dollars ($2,580); that said property was shipped by said A. W. Stevens & Son and delivered, through plaintiff, to defendants; that defendants took said property into their possession and to their farm; that the purchase price thereof was settled as follows: * * *

It is further admitted that at the time of the sale of said machinery by said A. W. Stevens & Son to the defendants, said A. W. Stevens & Son was a corporation for pecuniary profit formed in the State of New York, and was doing business in the State of Missouri, and it had not at that time, and never has since, complied with the terms of the Act of the General Assembly of the State of Missouri, entitled, 'An act to require foreign corporations doing business in this state to have a public office or place of business in this state at which to transact its business, and subjecting it to certain conditions and requiring it to file its articles of incorporation with the secretary of state and to pay certain taxes and fees thereon; approved April 21, 1891;' that the said A. W. Stevens & Son, at the time of making said contract with the defendants, had wholly failed to, and has ever since wholly failed to, maintain a public office, or place of business, in this state, for the transaction of business where legal service may be obtained upon it, and where proper books are kept, to enable such corporation to comply with the constitutional and statutory provisions governing foreign corporations.

That while said machinery sold by said A. W. Stevens & Son was on the farm of defendants in Cooper county, Missouri, a bill of sale transferring the same to the plaintiff was executed, on or about July 20, 1899, in the State of New York, by said A. W. Stevens & Son, and the same was forwarded by mail to the plaintiff at Boonville, Missouri; that the old threshing machine was never delivered to A. W. Stevens & Son, but was resold by said A. W. Stevens & Son to the defendants, and the other machinery has also remained upon the place of the defendants, and part of it, the engine, has been used by them." * * *

Appellant asks for a reversal of the judgment because the act which prohibits foreign corporations from doing business in this state, until they comply with the provisions thereof, is 'in so far as it seeks to make contracts so made with corporations of other states void, before they have complied with the requirements of said act, unconstitutional, because such act seeks to take from such foreign corporations, or non-resident citizens, its, or his property without due process of law, and denies to such foreign citizen the same rights, immunities and privileges that are accorded to the citizens of this state, and because it denies to such foreign corporation or citizen the equal protection of the law.'

It will be seen that counsel for appellant assails the validity of the act upon three separate and distinct grounds: first, because it seeks to deprive the foreign corporation of its property without due process of law; second, that it denies such corporations the same rights, immunities and privileges that are accorded to the citizens of this state; and, third, it denies to such corporation equal protection of the law.

The learned counsel, it seems to us, wholly misapprehends the meaning and scope of the act. The act is prohibitive in its operation. It seeks to prevent foreign corporations from doing business in this state until they have complied with the provisions of the act by filing a copy of their charter or articles of incorporation with the secretary of state and by appointing an agent in this state to represent them. If such corporation, in violation of the act, does business in this state, all such transactions are, by the courts, declared null and void, and all contracts made by them with citizens of this state for the sale of goods, wares and merchandise are nullities, and the title to the property sought to be transferred thereby does not pass to and vest in the vendee, but remains in the vendor, the same as if the pretended contract had not been executed. It is, therefore, clearly

seen that the act does not violate the constitutional provision which prevents the taking of property without due process of law, because the act does not take the property of a foreign corporation from it, nor does it give to another, but lets the title thereof remain in and bide with the corporation; and if the corporation had parted with the possession of its property, under the void contract, and is unable to recover the possession without litigation, then the doors of the courts of this state are open to it, and it stands before the law upon precisely the same footing that residents of this state do—no better, nor no worse. We are unable to see in what way the act in question denies to such corporations the same rights, immunities and privileges that are accorded by law to the citizens of this state, or how it deprives them of the equal protection of the law. For under the facts of this case a citizen of this state would not be permitted to recover the possession of the property sold to the respondents, nor its value, in case of its conversion, without first refunding or paying back to the respondents the consideration paid by them under the void contract, and received by Stevens & Son. He would be estopped from claiming the property until the purchase price had been returned, and for the same reason A. W. Stevens & Son, and its assignee, the appellant, is estopped in this case. See cases before cited.

What has been stated in paragraph two of this opinion also answers, in the negative, the contention of appellant, that the judgment in this case 'takes private property for private use.' Neither the act in question nor the judgment of the court takes or disturbs the title of the property. The title remains just where A. W. Stevens & Son placed it, subject to the equities created against it by the conduct and action of the parties at the time of the pretended sale of the property to respondents.

Respondents contend that where a contract is illegal and void because contrary to the policy and laws of the state, the courts will not only refuse to aid those seeking to enforce such an illegal contract, but will not lend their assistance to those attempting to escape from it, and cites in support of that contention the cases of Downing v. Ringer, 7 Mo. 585, and Mason v. Pitt, 21 Mo. 392. The first case mentioned was a suit on a promissory note, given as part payment of the purchase price of a lot of ground in the town of Philadelphia, Marion county, Missouri. The defense interposed was a statute of 1835, which imposed a penalty upon the propriety of a town, village, or of an addition thereto, for selling a lot therein before recording the plat or map thereof. The court held that the sale was in violation of the statute, and that the vendor could not recover the purchase money because the court would not aid him in doing that which was prohibited by law."

In disposing of this question the court said in part: "This court in the case of Kelerher v. Henderson, not yet reported, in discussing this same question, used the following language: 'The law does not impress upon the subject matter of the contract its stamp of condemnation, but upon the contract itself. Unless the plaintiffs' contract, by which they seek to enforce their rights, is infected with champerty, we see no reason why this suit may not be maintained, though such a contract exists between the defendant and the bondholders. It is time enough to turn a party out of court when he asks the aid of a court to enforce such a contract.' And the court further said in that case: 'The fact that certain collateral portions of the contract or transaction which is before the court are tainted with illegality, that fact will not defeat a recovery upon the other provisions of the contract, which in themselves give a complete cause of action without the assistance of the infected portions. Vette v. Geist, 155 Mo. 27.' "

SOME OBSERVATIONS ON STATE LAWS AND MUNICIPAL ORDINANCES IN CONTRAVENTION OF COMMON RIGHTS, INTERFERING WITH INDIVIDUAL LIBERTY, AND ATTEMPTING TO REGULATE PERSONAL ASSOCIATION AND EMPLOYMENT.

1. The Controlling Principle—Limitations.
2. Regulations Contested Because in Contravention of Common Rights—Illustrations.
3. Interference with Individual Liberty.
4. Denial of Common Rights Because of Class, Race or Religious Sect, etc.
5. Laws Which Attempt to Regulate Personal Association or Hamper Freedom of Social Intercourse.
6. Liberty of Employment.

1. *The Controlling Principle — Limitations.—Salus populi est suprema lex.* Therefore, to promote the public welfare the state may restrain and regulate the use of liberty and property. This has been attempted in various ways by state and municipal regulations. Just how far the law may go can be ascertained only by a careful and detailed examination of the several legislative acts and judicial decisions relating to the subject. Such examination will show what has been accomplished and approved by experience, what attempted and what failed. The expression of social, economic and political conditions, as exhibited by the law, like other departments of human activity, is not always the same. Men, as legislators and judges, differ, and this contrariety of opinion dis-

tinctly appears in legislative acts and judicial decisions; therefore, it frequently occurs that the police power, as applied to a given state of facts, is more or less elastic.

The proposition is maintained everywhere that the object of government is to promote justice, morality, decency and good order; to protect health, life and limb, individual liberty of action, private property and the legitimate use thereof, and to provide generally for the safety and welfare of the people. What are these things? Different tests or standards are used, hence conflict of opinion results when applied to a concrete case. This confusion may be noted in the consideration of police regulations where their enforcement is opposed on the ground that they are in contravention of common rights, or interfere with individual liberty, or attempt to regulate personal associations, or hamper freedom of social intercourse, or restrain the liberty of personal employment. Everywhere personal liberty is regarded as a sacred, private right. Non-interference with purely private acts is a firmly established principle of legislative policy. As aptly put by a recent writer: "The conduct of the individual in the privacy of his home, not involving or affecting his legal relations to other persons, is generally exempt from the operation of the police power."[1] Social "relations of such a character are not legitimately subject to the police power, and we may speak of a right of social intercourse as a part of constitutional liberty. Therefore the law can not forbid free citizens to speak or walk or visit with each other."[2] The point may be illustrated by an example given by Prof. Freund: "Although gambling for money involves the transfer of property and is therefore not strictly private conduct, it is as a rule forbidden and punished only if carried on in public or *quasi*-public places."[3] So drunkenness or intoxication in public places is unquestionably a matter of police regulation and laws condemning such conduct are uniformly sustained for the reason that no one has the constitutional right to appear in a state of intoxication in the streets and public places and thereby degrade the public morals, to the annoyance and inconvenience of citizens in the discharge of their daily duties and to destroy the peace, comfort and good order and well being of society.[4] When the police regulation is applied to prohibitory liquor legislation the law is to be tested by a fair answer to the question: Does it in its enforcement interfere with entire freedom of private consumption? Speaking generally, it may be conceded that the state or municipal corporation has no right to concern itself with the private use of liquor. On this subject Prof. Freund quotes the following from the advocates of prohibition: "The opponents of prohibition misstate the case by saying that the state has no right to declare what a man shall eat and drink. The state does not venture to make any such declaration. A man may debauch himself in private and the state will not interfere, unless the debauchery creates a public nuisance or disturbs the public peace. * * * It is not the private appetite or home customs of the citizen that the state undertakes to manage, but the liquor traffic. * * * This is the ground of prohibition. * * * If by abolishing the saloon the state makes its difficult for men to gratify their private appetites, there is no just reason for complaint."[5] This general rule may be applied safely: If the thing forbidden is not intrinsically wrongful or vicious, tested by the generally accepted standards of morality or decency to be valid, the act condemned must (1) affect the legal rights of the parties involved, or (2) endanger public safety, order, health, or morality. Various illustrations taken from judicial decisions follow.

2. *Regulations Contested Because in Contravention of Common Rights—Illustrations.* —By common rights and privileges relating to personal freedom and the use and enjoyment of property, is meant such rights and privileges as are open to all upon the same terms and conditions. That which is not forbidden may be done lawfully, but that which is prohibited by law may not be done legally. Thus, in the absence of law, the butcher may

[1] Freund, Police Power, sec. 453.
[2] Freund, Police Power, sec. 457.
[3] Freund, Police Power, sec. 453.

[4] State v. Sevier, 117 Ind. 338, 20 N. E. Rep. 245; People v. French, 102 N. Y. 583, 587, 7 N. E. Rep. 913; State v. Cantieny, 34 Minn. 1, 24 N. W. Rep. 458; Fairmont v. Meyer, 83 Minn. 456, 86 N. W. Rep. 457; Bloomfield v. Trumble, 54 Iowa, 399, 37 Am. Rep. 212, 6 N. W. Rep. 586; Gallatin v. Tarwater, 143 Mo. 40, 44 S. W. Rep. 750; Green City v. Holsinger, 76 Mo. App. 567. Drunk in Private, State v. McNinch, 87 N. Car. 567.

[5] Freund, Police Power, sec. 453.

kill his animals in the streets and public places of a city or town. If the butcher may do this any other man may do the same; hence, this privilege may be said to be a common right; but if the law forbids it it is no longer a common right. So if not forbidden by law the right to keep intoxicating liquors in business and other places may be said to be a common right. But when the right to do so is denied by law it is no longer a common right, but a legal restraint imposed on a few for the benefit of the many.[6] The sale of liquor as a beverage is not a privilege of the individual guaranteed by any law. Hence, a denial by law of the right to sell is not destroying a common right.[7] So in the absence of legal restraint, restaurants, bar rooms and other places of business may be kept open at night, as well as by day, or on Sunday, as well as on other days of the week, and those engaged in such business may be said to enjoy common rights in this respect, but if the law imposes reasonable regulations respecting hours of business or forbids the doing of business on Sunday the right to do business during the forbidden hours, or on Sunday, is no longer a common right.[8] The point may be further illustrated in legislation imposing a tax or license on those engaged in specified occupations. As it is entirely legal to do business without the payment of a tax or license, in the absence of a law providing therefor, it may be said to be a common right to engage in the business, but if the law exacts a charge for the privilege the right to do such business without the payment of the sum levied does not exist, hence it is not a common right. In a North Carolina case an ordinance imposed a tax on all persons following a particular business whether residents of the municipal corporation imposing the tax or not. The tax was opposed on the ground that it was a clear interference with common rights. Here the regulation was sustained against this contention.[9] On the other hand, in Missouri the imposition of a tax on vehicles of nonresidents engaged in hauling into and out of the municipal corporations exacting the levy was denied.[10] These latter examples clearly indicate the conflicting view of courts respecting what are common rights. In a well considered case the Supreme Court of the United States sustained a municipal ordinance which forbid washing and ironing in public laundries and wash houses, within specified limits, from 10 o'clock at night to 6 o'clock in the morning. The view expressed was that the enactment was a purely police regulation.[11] In North Carolina an ordinance which required stores, except drug stores for the sale of drugs and medicines, to close at 7:30 p. m., except on Saturdays, was declared void. The court expressed the opinion that the regulation was oppressive and against common rights, because it deprived store keepers of their natural right, free use and enjoyment of property used in such way as not to interfere with the rights of others.[12] It should be noted that the municipal charter did not confer special power to pass such ordinance, but the charter contained only general power incident to municipal corporations and authority conferred by the general welfare clause.

In New Hampshire usual municipal powers are held sufficient to sustain an ordinance making it unlawful to keep open restaurants after ten o'clock at night.[13] As relates to saloons and dram shops, charter power to regulate them is usually held by the courts sufficient to authorize penal ordinances fixing the hours when such places shall open and close. However, such business in its very nature requires careful police supervision and therefore courts incline strongly to view with favor all reasonable regulations designed to preserve order and prevent breaches of the peace at such places. The right to conduct a business of this character can not be said to be a common right as this term would properly apply to the business carried on at the ordinary shop or store.[14] But it is a denial of a common right to forbid one who sells liquor from occupying his own premises between

[6] Charleston v. Ahrens, 4 Strobb (S. Car.), 241, 257.
[7] State v. Richardson (Oreg.), 85 Pac. Rep. 225.
[8] McClelland v. Denver, 86 Pac. Rep. 126, Sunday closing of barber shops.
[9] Edenton v. Capehart, 71 N. Car. 156.
[10] St. Charles v. Nolle, 51 Mo. 122, 11 Am. St. Rep. 440.
[11] Barbier v. Connelly, 113 U. S. 27, affirmed in Soon Hing v. Crowley, 113 U. S. 703.
[12] State v. Ray, 131 N. Car. 814, 42 S. E. Rep. 960.
[13] State v. Freeman, 38 N. H. 426, 428.
[14] Tarkio v. Cook, 120 Mo. 1, 25 S. W. Rep. 202; *Ex parte* Wolf, 14 Neb. 24, 14 N. W. Rep. 660; State v. Washington, 44 N. J. L. 603, 45 N. J. L. 318; Smith v. Knoxville, 3 Head. (Tenn.) 245; Maxwell v. Jonesboro, 11 Heisk. (Tenn.) 257.

designated hours; *e. g.* 10 p. m. and 4 a. m.[15] The same fundamental rule was sustained in an early Indiana case, where it was held that general municipal power to regulate wharves, etc., was insufficient to sustain an ordinance defining the line of high water mark and declaring the erection of buildings below such line as a nuisance, and imposing a fine on persons erecting such buildings on their own land.[16] The right to fish in a navigable river, although within the corporate limits of a town, is a common right; hence, a by-law which confines such privilege to residents and denies it to non-residents is in derogation of such right. Reasonable use of public property must be open to all on the same terms and conditions.[17] The same principle applies to the use of public ways and streets. The municipal corporation is regarded as the trustee of such ways when the fee is in the local corporation or in the abutter. Thus local legislation permitting erections in such places which constitute obstructions or interference with the free use of such public ways in the usual manner is not authorized.[18]

3. *Interference With Individual Liberty.*—All regulations which hamper the free action of the individual and tend to interfere with individual liberty unless demonstrably promotive of the public welfare are viewed with disfavor by the courts. Various phases of such interference appear in the judicial decision, as those relating to the observance of the Sabbath and regulating the hours of business, above mentioned. Laws compelling the cessation of specified secular business on Sunday are generally sustained.[19] But in the absence of special power general authority to preserve the peace, enact ordinances, etc., will not sustain a municipal regulation prohibiting the conducting of a lawful business as mercantile on Christmas day.[20] While if a law is violated in the presence and view of a public officer he may arrest the offender legally, without warrant, whether the law so authorized or not,[21] a municipal ordinance which empowers police officers to make arrests without a warrant for breaches of local laws, not committed in their presence and view cannot be sustained since this interferes with the common rights and liberty of the individual.[22] Likewise, an ordinance is void which authorizes named officers to arrest and detain until the extinguishment of a fire any person who refuses to obey their direction.[23]

The right of shelter to all classes is clearly a common right. Thus an ordinance which forbids the renting of private property to lewd women or to any person for their use is in derogation of such right, and therefore void.[24] But obviously a law may forbid legally any prostitute from being on the streets and public places between designated hours, *e. g.*, 7 p. m. and 4 a m., without any reasonable necessity therefor, as such regulation is designed to protect the public morals.[25] However, without express power, it has been held in Arkansas that an ordinance declaring that any person bearing the reputation of a prostitute shall be fined if residing or found within the corporate limits, is void.[26]

As the individual has no natural or inherent right to carry concealed weapons, it is entirely competent for the state in the proper exercise of its police power to forbid it under appropriate penalty.[27]

Although the right to speak freely in public or private is sufficiently guaranteed by

[15] State v. Thomas, 118 N. Car. 1221, 24 S. E. Rep. 535; Compare State v. Callaway (Idaho), 84 Pac. Rep. 27.

[16] Evansville v. Martin, 41 Ind. 145.

[17] Hayden v. Noyes, 5 Conn. 391; Willard v. Killingworth, 8 Conn. 247.

[18] Stack v. East St. Louis, 85 Ill. 377, 28 Am. Rep. 619; Pettis v. Johnson, 56 Ind. 139.

[19] Karwisch v. Atlanta, 44 Ga. 204; Nashville v. Link, 12 Lea (80 Tenn.) 499, Charleston v. Benjamin, 2 Strob L. (S. Car.) 508; *Ex parte* Abram, 34 Tex. Crim. Rep. 10, 28 S. W. Rep. 818; McPherson v. Chebanse, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. Rep. 454; Thesein v. McDavid, 34 Fla. 440, 26 L. R. A. 234, 16 So. Rep. 321; St. Louis v. Cafferata, 24 Mo. 94; Lynch v. People, 16 Mich. 472; Megown v. Com., 2 Metc. (Ky.) 3; Minden v. Silverstein, 36 La. Ann. 912.

[20] Watson v. Thomas, 116 Ga. 546, 42 S. E. Rep. 747.

[21] McQuillin, Mun. Ord., § 306.

[22] Pesterfield v. Vickers, 3 Coldw. (Tenn.) 205.

[23] Judson v. Reardon, 16 Minn. 431.

[24] Milliken v. Weatherford, 54 Tex. 388, 38 Am. Rep. 629.

[25] Dunn v. Com., 20 Ky. Law Rep. 1649, 43 L. R. A. 701, 49 S. W. Rep. 813; McQuillin, Mun. Ord., § 475.

[26] Buell v. State, 45 Ark. 336; Paralee v. Camden, 49 Ark. 165, 4 Am. St. Rep. 35, 4 S. W. Rep. 654. In Shafer v. Mumma, 17 Md. 331, 79 Am. Dec. 656, a similar ordinance was upheld, enacted by virtue of express grant of power.

[27] Van Buren v. Wells, 53 Ark. 368, 14 S. W. Rep. 38; *In re* Cheney, 90 Cal. 617, 27 Pac. Rep. 436; Opelousas v. Giron, 46 La. Ann. 1364, 16 So. Rep. 190; St. Louis v. Vest, 84 Mo. 204; Cottonwood Falls v. Smith, 36 Kan. 401, 13 Pac. Rep. 576; Abbeville v. Leopard, 61 S. Car. 99, 39 S. W. Rep. 248.

fundamental law, the privilege of delivering sermons, lectures, addresses and discourses in the streets and other public places may be restricted, if in the discretion of the constituted public authorities the public welfare demands it; and such exercise of the police power is a legal restraint on the liberty of the individual, *i. e.* the liberty of the individual in this respect ends where the right of the public begins, and the determination of the point of conflict is confided by the law to specified public officers.[28]

4. *Denial of Common Rights Because of Class, Race or Religious Sect, etc.*, by hostile and discriminating state and municipal legislation has been considered in numerous cases.[29] The principles involved have been treated exhaustively by the Supreme Court of the United States.[30] The regulation must apply alike to all persons engaged in a given pursuit without distinction as to nationality, race, creed or political opinion. An ordinance is clearly invalid which undertakes to regulate a particular business that confers upon the municipal authorities arbitrary power to give or withhold consent as to persons or places, and permits unjust discrimination founded on difference of race.[31] So an ordinance demanding the arrest of any free negro found on the street after ten o'clock at night, and requiring him to be placed in the calaboose to remain until the next morning and fined a named sum, was declared in an early Tennessee case "high-handed and oppressive, and enacted by the corporation without any authority." Such enactment impairs the freedom of the individual and is a clear denial of a common right.[32] So a municipal regulation conferring upon one religious sect a privilege denied to others is in manifest contravention of common rights.[33] The San Francisco queue ordinance case, which attempted to discriminate against the Chinese, is an instructive decision on the subject under consideration. Mr. Justice Field severely condemned the oppressive regulation and declared "It is not creditable to the humanity and civilization of our people, much less their Christianity, that an ordinance of this character was possible."[34]

5. *Laws Which Attempt to Regulate Personal Association or Hamper Freedom of Social Intercourse* exist, and are valid only when the thing forbidden is detrimental to the public welfare. The law takes no notice of, and has no concern with, mere guilty intention, unconnected with any overt act or outward manifestation. Thus an ordinance declaring it an offense for any person to associate knowingly with those having the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, gamblers, etc., goes too far and is a clear invasion of the right of personal liberty.[35] So an ordinance enacted by virtue of a charter conferring specific power on the municipal corporation "to prevent vice and immorality, to prohibit, prevent and suppress the keeping of houses of ill-fame or assignation, or for the resort of common prostitutes, disorderly houses," etc., which provides that no person shall "permit drunkards, intoxicated persons, tipplers, gamblers, persons having the reputation or name of being prostitutes, or other disorderly persons to congregate, assemble, visit, or remain in his or her house, tavern, inn, saloon, cellar, shop, office or other residence, or place of business," is bad. It is to be noted that knowledge of the reputation of the persons named is not made an element of the offense. "We do not hold," remarked the court, "that if the ordinance were limited in its operation to places of resort where prostitutes may be presumed to go for immoral purposes, like a liquor saloon, it may not be competent to exclude all having the reputation of being prostitutes, or that it may not be competent to require in such a case that

[28] Commonwealth v. Davis, 140 Mass. 485, 4 N. E. Rep. 577; Davis v. Massachusetts, 167 U. S. 43; Commonwealth v. Davis, 162 Mass. 510, 26 L. R. A. 712, 39 N. E. Rep. 113; Commonwealth v. Brooks, 109 Mass. 355; Commonwealth v. Abrahams, 15 Mass. 57, 30 N. E. Rep. 79; Wilson v. Eureka, 173 U. S. 32; Love v. Recorder's Court, 128 Mich. 545, 87 N. W. Rep. 785, 55 L. R. A. 618.

[29] *In re* Yick Wo, 69 Cal. 294, 9 Pac. Rep. 139; *Ex parte* Mount, 66 Cal. 448, 6 Pac. Rep. 78; *Ex parte* Wolten, 65 Cal. 269, 3 Pac. Rep. 894; *Ex parte* Moynier, 65 Cal. 33, 67 Pac. Rep. 728.

[30] Barbier v. Connolly, 113 U. S. 27; Soon Hing v. Crowley, 113 U. S. 703.

[31] Yick Wo v. Hopkins, 118 U. S. 356.

[32] Memphis v. Winfield, 8 Humph. (Tenn.) 708.

[33] Shreveport v. Levy, 26 La. Ann. 671; Gilham v. Wells, 64 Ga. 192.

[34] Ah Kow v. Nunan, 5 Sawyer (U. S.), 552, with notes by Judge Cooley, 18 Am. Law Reg. 684.

[35] *Ex parte* Smith, 135 Mo. 223, 33 L. R. A. 606, 36 S. W. Rep. 628; St. Louis v. Roach, 128 Mo. 541, 31 S. W. Rep. 915; St. Louis v. Fitz, 53 Mo. 582.

the proprietor see to it, at his peril, that none having that reputation in fact, congregate at or visit his place of business."[36] So an ordinance hampers freedom of social intercourse which makes it an offense for any person to associate, converse or loiter with any female known as a common prostitute, either by day or night, upon any of the streets or alleys, except her husband, father, brother or other male relative.[37] Likewise an ordinance making it a misdemeanor for any woman to go into any building where liquor is sold, or to stand within fifty feet of such building, is void.[38] But an ordinance is not unreasonable which forbids the keeping of any inclosure in, or connected with, any room wherein intoxicating liquors may be sold, which is or can, by any ingenuity or pretense, be used as a lounging or drinking place, or for any immoral purpose.[39]

6. *Liberty of Employment.*—It is well established that the hours of employment may be regulated by law, to promote health, etc.[40] So the law may forbid the employment of children under the age of sixteen years for a longer period than ten hours in any one day, since such law is not an infringement of equal rights. Children are not *sui juris;* they are wards of the state and subject to its control. As to them the state stands in the position of *parens patriæ.*[41] But it should be observed that laws forbidding the employment of adults (males) for more than a stated number of hours per day or week are bad, unless reasonably necessary to protect the public health, safety, morals or general welfare, for the right to labor or employ labor on such terms as may be agreed upon, is a liberty or property right guaranteed to such persons by the fundamental laws of the nation or state.[42] So it is competent for the state to forbid the employment of children in certain callings, merely because it believes such prohibition to be for their best interests, although the forbidden employment does not involve a direct danger to morals, decency, life or limb.[43] So the law may prohibit the employment of children under a specified age, as sixteen years, in certain vocations, as those injurious to health (named exhibitions), singing or playing on musical instruments, rope or wire walking, etc., and exempt children as singers or musicians in churches, schools, etc.[44] And a law was sustained which forbids the employment of children under the age of fourteen years in any mercantile institution, office, laundry, manufactory, workshop, restaurant, hotel or apartment house, or in the distribution or transmission of merchandise or messages, but which allows children of the age of twelve years to work at such places under named circumstances. The purpose of the law was to promote the general welfare by protecting minors from injury by overwork and facilitating their attendance at school.[45] Laws may deny the right of employers to require females to work in factories, etc., more than ten hours in any one day.[46] So women may by law be denied the privilege of serving as waitresses in saloons or dance halls, and they may also be prevented from resorting to such places after midnight.[47]

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[36] Grand Rapids v. Newton, 111 Mich. 48, 66 Am. St. Rep. 387.

[37] Hechinger v. Maysville, 22 Ky. Law Rep. 486, 49 L. R. A. 114, 57 S. W. Rep. 619; S. P. Cady v. Barnesville, 4 Weekly Cin. Law Bul. (Ohio) 101.

[38] Gastenau v. Com., 108 Ky. 473, 49 L. R. A. 111, 56 S. W. Rep. 705.

[39] State v. Barge, 82 Minn. 256, 53 L. R. A. 428.

[40] Walden v. Hardy, 169 U. S. 366.

[41] State v. Sharey (Oreg.), 86 Pac. Rep. 881; 1 Tiedeman, State and Fed. Control, p. 335; Freund, Pol. Powers, § 259.

[42] Lochner v. New York, 198 U. S. 45; *Ex parte* Kuback, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. Rep. 737; Frorer v. People, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. Rep. 395; State v. Loomis, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. Rep. 350; Seattle v. Smyth, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. Rep. 1120.

[43] State v. Sharey (Oreg.), 86 Pac. Rep. 881; People v. Ewer, 141 N. Y. 129, 25 L. R. A. 794, 38 Am. St. Rep. 788, 36 N. E. Rep. 4.

[44] *Ex parte* Weber (Cal.), 86 Pac. Rep. 809.

[45] *Ex parte* Spencer (Cal.), 86 Pac. Rep. 896.

[46] State v. Muller (Oreg.), 85 Pac. Rep. 855.

[47] *Ex parte* Smith, 38 Cal. 702; Compare, *In re* Mary Maguire, 57 Cal. 604.

CHARITIES—LIABILITY FOR NEGLIGENCE.

ADAMS v. UNIVERSITY HOSPITAL.

Kansas City Court of Appeals, Missouri, Jan. 14, 1907.

A private, or *quasi* private charity is not liable for negligence of its employees, or for its own negligence in selecting employees.

An association established under Rev. St. 1899, ch. 12, art. 11, providing for organization of benevolent, religious, scientific, etc., associations, the charter of which provides that its object shall be to conduct and

control a certain hospital, to provide medical treatment free to the poor, and to train and educate nurses, which has no stock, and pays no dividends, but devotes any income from paying patients to the improvement and maintenance of the hospital, which receives persons free of charge for board even, when unable to pay, and furnishes other places, known as free institutions, with physicians, nurses and medicines, gratuitously, is a charity.

ELLISON, J.: The plaintiff was a patient at the defendant's hospital whither he had gone to have a surgical operation performed upon him. While yet under the influence of an anesthetic administered for the purpose of the operation and after the performance of the operation, he was placed in the charge and care of one or more of defendant's nurses, who, it is charged, were not competent, and by reason thereof they permitted him to be severely burned on the legs by rubber bottles filled with hot water whereby he was painfully and permanently injured. He brought the present action against the defendant for damages and prevailed in the trial court.

Serious injury to plaintiff was shown, and the defendant's main contention is that it is a benevolent or charitable institution, and as such is not liable to an action for damages caused by the acts of its employees; that, as such an institution, it is exempt from application of the doctrine of *respondeat superior*. Defendant insists that it is neither liable for the negligence of its servants, nor for its own negligence, if any, in undertaking to select competent servants. Upon the other hand, the plaintiff contends that there is liability, if there was negligence either of the servant, or of the defendant in selecting a competent servant.

If the questions made in this case have been heretofore decided in this state, it has escaped our attention. No case has been cited. That of Murtaugh v. City of St. Louis, 44 Mo. 479, involved the liability of a municipality for injuries received in a city hospital, and it was held that the city was not liable. The decision is put upon the ground that a city is not liable for acts of its officers in administering a corporate franchise conferred for the general public good. That of Haggerty v. Railway Co., 100 Mo. App. 424, 74 S. W. Rep. 456, did not involve the question of the exemption of charitable institutions. The St. Louis Court of Appeals ruled that a department organized by the railway company, known as the "relief department," was not a charity, but that it was merely a business arrangement of the employees of the company.

The question as presented here relates to the liability of a private, or *quasi* private, charity for damages caused by the negligent acts of its employees, or by its own negligent act in employing incompetent employees. We will assume that the evidence tends to show the plaintiff was injured either by the negligence of one of defendant's nurses or by her incompetence. If by the latter, we will assume, for the purpose of disposing of the case, that there is enough in the record to justify a verdict that the defendant was careless in selecting her. But as, in our opinion, the defendant is neither liable for the negligence of one of its employees, nor for its own negligence in selecting an incompetent employee, it can make no difference which of the two acts caused the injury. Every member of the public is interested in the building up and maintenance of a charitable institution designed for the alleviation of human suffering, and every one may be supposed to be concerned in such institution, and to be a party to a line of action or conduct which would disable every other from doing anything which has a tendency to prevent the institution from performing the functions intended by its founder. The state itself is concerned that its citizens may be restored to health, and to that end may have places always open where those in need may obtain relief. So it may be said that any citizen who accepts the service of such institution (it making no difference whether in any special instance he pays his way), does so upon the ground, or the implied assurance, that he will assert no complaint which has for its object, or perhaps we should say, for its result, a total or partial destruction of the institution itself. If an organization for charitable purposes founded upon the bounty of others who supply funds for the purpose of administering relief to those in need of relief, and of extending aid, care and protection to those who have no one to call upon by the ties of nature, may have its funds diverted from such kindly purpose, would it not inevitably operate to close the purses of the generous and benevolent who now do much to relieve the suffering of mankind? Let us see what the practical result might be. With a view to supplying care, protection, and education to dependent children without parents, some good man puts in trust for building an orphans' home the sum of $25,000, and for its perpetual maintenance the further sum of $100,000 to be put at interest or otherwise invested. The trustees may unfortunately, without proper inquiry or care, employ an incompetent servant. That servant, in the first year's existence of the home, may, from ignorance, or from negligence, do, or omit to do, something causing damage which, under our liberal measure of compensation for personal injuries, would be sufficient to take up the whole fund, and thus, for a single mishap, the generous object of the donor would be thwarted, and what was intended as perpetual relief to succeeding generations of helpless children would be wiped out. That funds supporting organizations for charity cannot be thus diverted, in other words, that charitable institutions or corporations are not liable for the negligence of an employee, nor for the want of care in the selection of an employee, is sustained by authority and by reason.

The question arose in England, and was decided in the House of Lords. Heriot's Hospital v. Ross, 12 Clark & F. 507. In that case Heriot, a jeweler, by his will, in the year 1623, left a large part of

his estate to certain officers of the city of Edinburg in perpetuity for founding and maintaining a hospital for the "maintenance, relief, bringing up, and education of so many poor fatherless boys, freemen's sons of that town, as the means which I give, and the yearly value of the lands so purchased shall amount and come unto." The hospital was to be governed by rules formulated by a certain doctor named in the will. The rules, as framed, admitted to the hospital boys between certain ages. More than 200 years after it was founded, a boy, alleging that he was wrongfully excluded, brought his action against the feoffees of the hospital in their official capacity, for damages. Opinions of Lords Cottenham, Brougham, and Campbell are reported which are remarkable for the vigor with which they assail the proposition that the funds of a charity may be diverted to the payment of damages for malfeasance of the trustees. Lord Campbell pronounced the suggestion that persons damaged could be indemnified out of the trust fund to be "contrary to all reason, and justice, and common sense." He stated that there was "not any authority, not a single shred to support" such view of the law. In reversing the decree of the lower court he further stated that "it is to be hoped that we shall never again hear of a decision like the present, contrary to reason, sense and justice." In the course of their opinions, the judges refer as authority to the case of Duncan v. Findlater, 6 Clark & F. 894. That case has been overruled in Mersey Docks v. Gibbs, L. R. 1 H. L. 117 (same case in 11 H. L. Cas. 720; 1 Eng. and Irish Appeal Cas. 93), and was, therefore, not followed in as late a case as that of Gilbert v. Corporation of Trinity House, L. R. 17 Q. B. 795. From the fact that Duncan v. Findlater was stated to be authority supporting the holding in Heriot's Hospital v. Ross, and that the former was afterwards overruled, the notion came to prevail, in some quarters, that the latter case was also discredited. But an examination of the cases, and others of similar character will disclose that they belong to different classes and that the principle or foundation upon which they rest is radically unlike. One class involves the right to divert charity funds from the object of the donor by appropriating them in payment of damages caused by the neglect of the trustees; the other involves the liability of public corporations, not charitable, for the negligence of trustees or other officers in charge thereof. It is not necessary to refer to the rule as to liability of corporations in this country, or to differences which may exist between the rule adopted in this state and that applied in England, whether such corporations be private trading corporations, or governmental, or partly both It is sufficient for present purposes to know that Heriot's Hospital v. Ross, involving a case of a distinct and wholly different class, has not had its value at all abated by the other cases. Duncan v. Findlater was an action against the trustees of a public road, appointed under a statute, and was for injury to one traveling at night, by reason of defects in the highway. The decision was that the road fund was not to be subject to such damages. It was overruled, as above stated, in Mersey Docks v. Gibbs, a case which trustees, who were by statute in charge of a harbor and docks, suffered them to become obstructed with mud so that a ship and cargo were damaged. It was decided that the corporation was liable for the negligence of the trustees, and Duncan v. Findlater was overruled. But the ground of objection to Duncan v. Findlater was not a ground which can apply to the reason for the rule which supports the exemption of charities. The Mersey Docks were authorized by act of parliament, and were entitled to receive port dues and apply the same to the improvement of the harbor and maintaining the docks, to the payment of debts, and, after such debts were paid, the trustees were required to lower and reduce the rates "as far as can be done, leaving sufficient for defraying all charges of management and other concerns of the docks, etc., and improving, repairing, and maintaining the same, and for carrying into execution the provisions of this act and former acts." While, in the course of the opinion strong objection is taken to Duncan v. Findlater in deciding no liability existed for negligently permitting a defective highway, yet the ground upon which the case is put turned upon a construction of the acts of parliament authorizing the trustees to take harge of the harbor and docks (see pages 104, 107, 118). At page 107, Justice Blackburn said: "Corporations, like the present, formed for trading and other profitable purposes, though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise, and we think that, in the absence of anything in the statutes (which creates such corporations) showing a contrary intention in the legislature, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works." The case decided in Queen's Bench (Gilbert v. Corporation of Trinity House, *supra*), is decided on the same principle as that which governed the Mersey Docks Case. It was a case where the care and management of all lighthouses and beacons in England and adjacent seas were vested in Trinity House, and the corporation was held to be liable for the negligence of one it licensed to remove a partially destroyed beacon.

It seems clear that those cases, and others of like character, should not be thought to be in conflict with those which have steadily maintained the rule exempting the diversion of funds set apart for the support of charitable institutions. We have not been advised of any case in England which has doubted the authority of Heriot's Hospital v. Ross. And, though it was

cited in Mersey Docks v. Gibbs, it is not questioned or mentioned by the court, undoubtedly upon the ground that it did not depend upon like considerations. Indeed, afterwards, in a case in the House of Lords, involving the liability of the Mersey Docks to be rated for taxation, Justice Blackburn, who delivered the opinion in the case of Mersey Docks v. Gibbs, disclaimed that that case involved considerations applicable to charities. In the course of his opinion, at page 465 of the report, he said that there were "several cases relating to charities which were mentioned at your Lordships' bar, but were not much pressed, nor, as it seems to us, need they be considered now, for, whatever may be the law as to exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption." Mersey Docks v. Cameron, 11 H. L. Cas. 443.

In this country whatever conflict in the authorities may appear has arisen from applying rules to charities which, as we have just seen, were laid down as governing an entirely different class of cases—cases clearly involving governmental function, or substitutes for private enterprise. A fund arising from charges against shipowners for use of docks for landing, unloading, and storing freight, a fund arising from toll taken of those using a public highway, and the like, are matters of business or are *quasi* governmental concern, which bear no likeness to the funds which are provided by the generosity of donors for the perpetual alleviation of suffering and for the betterment of the health and moral being of mankind. In the former class, it may be well enough to say that the law intended the fund to make good an injury which its managers may inflict. But in the latter, it would be against every principle of right and an outrage on justice to deplete a fund set aside for perpetual charity, by using it in paying damages caused by the acts of those engaged in administering the trust. Charity funds are things apart from ordinary matters of business or trade. In the thoughts and consciences of men, charities are not loaded with the burdens put upon other matters. Charity suggests different considerations and treatment from matters of ordinary business, and hence there has arisen out of the conscience, a principle which protects it in its beneficent and perpetual purpose. The greatest authority has said that, though prophecies shall come to naught, and tongues shall cease, and knowledge shall vanish away, yet "charity never faileth." That and other statements of like tenor, though perhaps referring to mental conditions, having doubtless done much to foster the privileges which have ever been accorded to material benevolence. To repeat a thought already suggested, every one, in the present or the future, coming within the object of a charity, has a right to the enjoyment of its benefits and no one has a right to appropriate to himself in settlement of claims, the fund whereby those benefits are secured. To permit it to be done would be not only setting aside the purpose of the donor, but would, in its results, allow the claim of one person to exclude the rights of all others who may come after him. It would be a matter of grave concern and regret if funds set apart for support of our charitable institutions should be made subject to the assaults of the damage claimant, and be called upon, not only for compensatory recompense, but to stand for punishment in the way of exemplary damages. Especially would it strike one as unfortunate, when it is realized that such claimant has his primary right to hold to the strictest accountability the individual who does him the injury for which he makes complaint, and that in denying him the right to impoverish benevolence we do not deny him a remedy against the actual wrongdoer. So the weight of authority in this country supports Heriot's Hospital v. Ross as being the rule which commends itself, not only because it carried out the donor's intention, but because it is more reasonable and just, and better subserves an enlightened public policy. Parks v. University, 218 Ill. 381, 75 N. E. Rep. 991, 2 L. R. A. (N. S.) 556; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. Rep. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; Williamson v. Louisville Reform School, 95 Ky. 251, 24 S. W. Rep. 1065, 23 L. R. A. 200, 44 Am. St. Rep. 243; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Maia v. Eastern Hospital, 97 Va. 507, 34 S. E. Rep. 617, 47 L. R. A. 577; Downes v. Harper Hospital, 101 Mich. 555, 60 N. W. Rep. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427; McDonald v. Hospital, 120 Mass. 432, 21 Am. Rep. 529; Benton v. Trustees, 140 Mass. 13, 1 N. E. Rep. 836, 54 Am. Rep. 436.

We have found but one case (Galvin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675) which takes ground against the view we have endeavored to set forth, and that does not do so in such pronounced way as has been said. It is there conceded (page 428 of 12 R. I.) that only the income of the institution could be held. But whatever breadth the case may be thought to have, we learn from Parks v. University, *supra*, that the legislature of the state of Rhode Island has since nullified the effect of the decision. In the two cases last cited from the Supreme Court of Massachusetts, that court, while upholding the doctrine as stated by us, yet makes use of language in the opinions which leaves room for an inference that a liability might attach if the corporation had been negligent in selecting its surgeons in the one case and its superintendent in the other. The case of Hearnes v. Waterbury Hospital, 66 Conn. 98, 123-127, 33 Atl. Rep. 595, 31 L. R. A. 224, seems to concede that there will be a liability for negligence in selecting employees, but no liability for the negligence of the employees themselves, if selected with due care. But it is manifest that, if we uphold a rule which would make an institution of charity liable to a patient who has been injured by an incompetent servant, negligently selected, we destroy the prin-

ciple we have endeavored to make plain, that charitable trust funds cannot be diverted from the purposes of the donor, for it can make no difference, so far as the integrity of the fund is concerned, whether it be sought after by one who is injured by the negligence of a servant, or the negligent selection of such servant.

There are authorities which very properly hold that, where ship companies keep a physician on board (even though required to do so by law) to serve those who may choose to call him, he is not to be regarded as the company's servant, since his mode and manner of service is not under the control of the company. And that physicians and nurses which may be provided by railway companies at their hospitals, or the hospitals of employees, are not, for the same reason, the servants of the railroad. They are not charities, but are nothing more nor less than business associations formed for business purposes. Haggerty v. Railroad Co., *supra*. But cases of that class do not reach the question here involved. For decisive considerations which arise in the one are not found in the other.

Plaintiff refuses to concede that the defendant is a charity hospital. If it is not, it would be liable to this action though such institutions were exempt. We are, however, of the opinion that it is a charitable institution. It is established under chapter 12, art. 11, Rev. St. 1899, providing for the organization of benevolent, religious, scientific, etc., associations. Its charter provides that "the object of this association shall be to conduct and control the institution known as the 'University Hospital,' now owned and controlled by the university medical college of Kansas City, to provide medical treatment free of charge for the poor, and to train and educate professional nurses, and to confer upon them a degree." There was no stocks nor dividends, and everything realized from an income by payments from paying patients went to the improvement of the hospital and the maintenance of an equipment. Surgeons and physicians made no charge, and people who could not pay, even for board, were, by the rules, to be received free. Other places known as free institutions were furnished by defendant with physicians, nurses, and medicines gratuitously. It is true that a large body of patients seeking relief with defendant paid their way, some more and some less, and plaintiff himself was a "pay patient." But that circumstance amounts to no more than a contribution by such persons to the support of the institution. The authorities are that such circumstance does not alter the character of the institution. Downes v. Harper Hospital, 101 Mich. 555, 60 N.W. Rep. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427; Parks v. University, 218 Ill. 381, 75 N. E. Rep. 991, 2 L. R. A. (N. S.) 556; McDonald v. Hospital, 120 Mass. 432, 21 Am. Rep. 529.

Concluding, as we have, that the defendant is not liable to the action, and that plaintiff's remedy is against those who may have inflicted the injury upon him, we reverse the judgment. The other judges concur.

NOTE.—*Rationale of the Exemption of Charitable Institutions from Liability for Negligence of Agents.*—To tabulate the authorities on the much discussed subject of the liability of charitable organizations for the negligence and wilful wrongs of their agents, would be a work of supererogation. The reader can find them arranged and discussed, together with an able *resume* of the English cases, in the leading American case of Hill v. Boston, 122 Mass. 344, in an extended article in 53 Cent. L. J. 224, in note to the case of Freel v. School City, 37 L. R. A. 301, and in 2 Hughes' Procedure, 651. The object of this paper is to call the attention of the profession to the principle which underlies the indemnity granted by the law to these institutions, and to point out the want of harmony in the decisions as to what this ground is. It is the more remarkable that a difference of opinion should exist as to why immunity is given to charitable organizations, when practically all of the courts agree as to the fact of the immunity. The following enumeration will serve to show some of the many and contradictory reasons advanced by the courts in explanation of the well known exemption of these institutions from liability for negligence of employees:

(1) "Any citizen who accepts the service of such institution, does so upon the ground, or the implied assurance, that he will assert no complaint which has its * * * result, a total or partial destruction of the institution itself." Adams v. Hospital, 99 S. W. Rep. 454; Downs Admr. v. Hospital, 101 Mich. 555. (2) "It would be against every principle of right * * * to deplete a fund set aside for perpetual charity, by using it in paying damages caused by the acts of those engaged in administering the trust. Charity funds are things apart from ordinary matters of business or trade." *Id.* 455. (3) Charitable funds are for the benefit of the whole public and to allow their diversion "would be not only setting aside the purpose of the donor, but would * * * allow the claim of one person to exclude the rights of all others who may come after him." *Id.* 456; 53 Cent L. J. 224. (4) Such diversion of charitable funds would be unfortunate, "when it is realized that such claimant has his primary right to hold to the strictest accountability the individual who does him the injury." *Id.* 456; Downs Admr. v. Hospital, 101 Mich. 555. (5) Charitable institutions are freed from liability for the torts of their agents because they carry out the work of government, and ought to be accorded the same privileges claimed by the state. Ward v. St. Vincent's Hos., 50 N. Y. Supp. 466; McDonald v. Mass. General Hos., 120 Mass. 432. (6) Some of the cases state the ground to be that a patient in a charitable institution is a mere licensee "who must take the service as he finds it." Powers v. Mass. Hom. Hos., 101 Fed. Rep. 896. (7) The ground of nonliability is sometimes stated to be that the funds of the institution are impressed with a trust for the purposes contemplated by the donors, and cannot be lawfully diverted to any other. 53 Cent. L. J. 226. (8) The ground is also stated to be that charitable funds cannot be diverted "for negligence for which the donor is in no manner responsible." Downs Admr. v. Hospital, 101 Mich. 555. (9) "The exemption is generally allowed on the ground that such an institution is a *quasi* corporation with limited power, and that the officials perform their duties without compensation, and that public officers generally are not liable. Some cases place the exemption on the ground that there is no fund to meet such damages, and some cases turn on the point that the relation of master and servant does not exist."

Note to Freel v. School City, 37 L. R. A. 301. (10) A charitable institution is not liable, under the doctrine of *respondeat superior* because, "it derives no benefit from what its servants do in the sense of that personal and private gain which was the real reason for the rule." Hearns v. Waterbury Hos., 33 Atl. Rep. 95; Freel v. School City, 142 Ind. 27; 1 Hughes' Procedure, sec. 309, 2 *Id.* 651; Hill v. City of Boston, 122 Mass. 344.

Let the reader now close his eyes and say what principle of the law gives immunity to charitable and public corporations. After an exhaustive examination of the authorities, the conclusion to which one learned writer comes is that, "the drift of the foregoing cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant and not caused by its own corporate negligence or the failure to perform a duty impressed on it by law." But why? Few of the cases give the true reason for non-liability; and those that do mention it, give so many other reasons in the course of the discussion, that the principle is obscured, which underlies this whole branch of the law. (1) For instance, take the reason given at number 1 of the above tabulation, that a patient accepting assistance at a charitable hospital, impliedly agrees to make no complaint of negligence against it. This will not do as a general principle, because it has no application whatever to cases where men are picked up unconscious on the street and carried to a hospital without the slightest consent on their part, nor does it apply to children, or persons of unsound mind, nor does it apply to cases where the patient, though in a charitable institution, pays for his treatment, under a written contract specifying the treatment and attention to be given. This latter case arose in New York (Ward v. St. Vincent's Hospital, 50 N. Y. Supp. 466), where a patient paid $25.00 a week in the "private pay patients department" of a charitable hospital, under a contract providing for the constant attendance of skillful physicians and nurses, and for the best of care. There could be no implied contract of non-complaint here, and yet the court held the hospital not liable for the gross carelessness of a nurse who burned the patient with a hot water bag. The Ward case is principally put on ground number 5 tabulated above, which is not entirely sufficient in itself as will be later pointed out.

Nos. 2 and 3 above come nearer the mark, but do not, except indirectly, convey the fundamental idea involved. The impropriety of setting aside the purpose of a donor of a fund cannot be announced as a principle of law, because that is a thing often done where injury occurs in carrying out a trust created for private and personal ends. Neither is the statement that the rights of the public are paramount, entirely correct, for there are situations as in the Mersey Docks case (L. R. 1 H. L. 93, 11 H. L. Cas. 686), where although the public was greatly interested in and benefitted by the operation of docks by the town council of Liverpool, still there being a *quasi* profit accruing to the city, it was held liable for the negligence of the dock employees, and the public fund thus diverted into the pockets of a citizen. (4) The reason advanced under number 4 is no proper ground for maintaining this liability. There are thousands of cases where the plaintiff has his remedy against both the servant and the master. *Respondeat superior* is the rule. (5) The fact that charitable institutions carry out the work of government is good as far it goes, as a reason for their non-liability. But the underlying principle is broader, and gives immunity to many persons unconnected with government. In this country the government has nothing to do with the encouragement of religion, and yet churches and missionary societies are exempted in like manner as public and charitable institutions. Hass v. Missionary Society of the Most Holy Redeemer, 6 Misc. Rep. 281, 26 N. Y. Supp. 868. (6) The reason advanced that a charity patient, being a mere licensee, must take the service as he finds it, does not cover the case [of pay patients, or the case of an express contract, above mentioned. Number 7, does not meet the fact that the intentions of donors are often set aside, or that the principle extends to cases of individual acts of charity where there is no fund whatveer. Number 8 does not meet the last named objection, or the objection that funds employed in business, and private trust, are held liable, under the *respondeat superior* rule, irrespective of the negligence of the owner or donor. Such negligence cannot therefore be the line of cleavage. Number 9 is the general conclusion of the note writer to the case of Freel v. School City, and shows how shifting and uncertain are the expressions concerning the ground of this exemption. Number 10, it is submitted, states the true rule. One who derives a benefit from the act of another, is responsible for the negligence of the latter, in the line of duty. *Qui sentit commodum, sentire debet et onus.* 2 Inst. Jus. 489; Bro. Max. 706; 1 Hughes' Proc., 356; 2 *Id* 651. (He who receives the benefit must also bear the burden) covers the situation. A line drawn through the cases along this maxim eliminates accidental features of the various cases, *e. g.*, the implied contract of a patient; the purpose of the donor; the right of the injured to pursue the servant; the governmental function of the charity; or the relation of licensor and licensee between institution and injured. It also eliminates distinctions between the taking of the income allowed in one case (Glavin v. R. I. Hospital, 12 R. I. 411), and the taking of the principal; and between the negligence of the institution in selecting an employee, and the employee's negligence when selected, an argument which, as gravely advanced in several cases (McDonald v. Hospital, 120 Mass. 342; Benton v. Trustees, 140 Mass. 13; Hearns v. Waterbury Hosp., 66 Conn. 98; Connors v. Sisters, 10 Ohio, S. & C. P. Dec. 86; VanTassell v. Eye and Ear Hosp., 15 N. Y. Supp. 620), would lead to the destruction of the charities all are agreed must be maintained.

The church, the hospital, the public library, the school and the college are eleemosynary corporations; that is, they are of that class not organized for profit. Different rules of liability attach to these institutions from those applying to enterprises undertaken for profit. The rules applied to the former class are based upon the maxim, *salus populi suprema lex*, a maxim lying deeper, it may be said, than even *qui sentit commodum*, above referred to. The corporation for profit is governed by the maxim *qui sentit commodum*. This maxim is a *datum post* from which every liability on the one hand and exemption on the other is measured. Hughes' Proced. 1105, cases.

To illustrate, a railroad was held liable in the sum of $1000.00 for a kiss a brakeman gave a young lady passenger, but a school board ought not to be so liable for a like demonstration of admiration by a teacher. There is a wide distinction between the grounds of liability of a common carrier and of a school board. Hill v. City of Boston, *supra.*

Paul, the greatest of the apostles and a very profound *juris consult*, commended charity above all other spiritual manifestations. What he commended is always good law and good morals as well. It would not be wise to dry up the well-springs of the noblest of human emotions, and therefore *salus populi suprema lex*. It is the duty of the government to protect, educate and care for the child, the sick, the weak, the insane, and the defenseless. Therefore, the argument above noted that whoever steps into the place of the government should receive the immunity of government or of the parent is a good one, as far as it extends, and opens up to view the ground of immunity of parents who take the place of government in the education of their children. *Ubi eadem ratio ibi idem jus* (like reason makes like law). To those who may think it hard that an institution should hold its funds immune from attack for its negligent acts, we may suggest in passing that the law does recognize some wrongs without remedy. The maxim *rex non potest peccare* (the government can commit no wrong) has barred many a recovery. The maxim *salus populi* is of greater significance than *ubi jus, ibi remedium* (there is no wrong without remedy). The maxim we are considering, *qui sentit commodum, sentire debet et onus* is but another illustration of a wrong without a remedy, because the converse of that maxim, that he who does not receive the benefit, ought not to bear the loss, is founded in convenience and necessity, and must be the law.

It may be mentioned in closing that as a number of the cases above cited, show that persons in charge of public and charitable institutions are liable personally for their own negligence, this line of thought can be worked out under the leading cases of Coggs v. Bernard, 1 Smith Lead. Cas. 360, 471; McManus v. Crickett, 1 East. 106.

St. Louis, Mo. EDWARD D'ARCY.

JETSAM AND FLOTSAM.

THE ADVISORY SESSION.

This is the title of an able pamphlet by Mr. Virgil M. Hobbs of Oklahoma and is put forth in the interest of the establishment of good government in the coming state of Oklahoma. He proposes several constitutional provisions which are drafted and set forth. The whole tenor of the pamphlet breathes forth a spirit of purity and reform and many of the suggestions seem to be inspired by that patriotic spirit which should pervade the assembly which is intrusted with matters of such vast importance to the coming state. There is nothing so important to a state as its laws, the due administration of which is government. This pamphlet calls attention to the danger of too much law. The fact is that the fundamental principles preserved in the great maxims as gathered by Ulpian and preserved by Justinian in the Pandects which Tribonian chiefly edited, approved and adopted by Charlemagne and conserved by Francis Bacon, the wisest man of the ages and greatest lawyer and inculcated in the decisions of Mansfield, Kenyon and Ellenborough, to purify the laws in a time of great need in England; appreciated and adopted in the works of Story and Kent, guiding the great decisions of Marshall, Story, and Shaw, and the decisions of the Supreme Court of the United States and many of the state courts, particularly in the earlier days, and which make up the best opinions of modern times; we say these principles are sufficient in themselves to guide wise and good men educated in the law to do justice. In them and their proper construction there is constitution enough for any government outside of mechanical structures. A careful perusal of Hughes on Procedure, which is constructed upon the maxims and judgments of the above mentioned great law givers, would furnish material and information enough if understood and conserved. All this seems to be understood by the author of this pamphlet, for he says on page 6. "A thorough knowledge of basic principles, as a guide, is essentially necessary to a proper construction of a rule of procedure to be built upon them. The work of the legislator is a species of composit labor, necessitating a knowledge of local history, of sociological conditions, and of substantive law; and, to secure a higher degree of excellency, the highest moral and intellectual attainments are required. Mr. Stuart Mill, than whom as a student of mental philosophy, none takes a higher rank, says: 'There is hardly any kind of intellectual work so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long laborious study, as the business of making laws.'"

It is the highest duty of the statesman and the patriot, and it ought to be the highest pleasure of the editor who seeks to mould public opinion, to educate the public mind up to a higher, a purer and more exalted conception of the duties to be performed by the legislature. The first, the all important, the paramount duty of the delegates, whose duty it will be to draft a constitution for the people of Oklahoma, will be the proper construction of the legislative branch of the state government. If this department shall be properly constructed, all the troublesome questions—the liquor traffic, the school lands and funds, the much talked-about railroads, and all matters of like importance will be properly taken care of and solved to the entire satisfaction and contentment of the general public.

BOOK REVIEWS.

MCQUILLIN'S MISSOURI PRACTICE.

Matters of procedure and practice, in these days of laxness in such matters, are not given that close attention which attorneys under the old common law were wont to exercise. Lawyers, for some unaccountable reason, have come to discount the importance of rules of practice and of procedure, failing to recognize that procedure is the executive arena of jurisprud ence and therefore the life of the law. What a useless heap of clay is that wonderful mechanism known as the human body without that active principle which we call life. So also is the law only a heap of useless rubbish, except as the active element of procedure enters in and gives it life. For this reason it has been said by a great jurist that procedure is the backbone of the law; indeed the very essence of government. In the view we have given it is readily seen that this statement is not as great an exaggeration as it might seem to be on first impression. We are, therefore, always inclined to regard any great work on pleading, practice or procedure, with more interest than many lawyers would think, or superficial observation, they might deserve. For that reason, as may have been observed by our readers, we have

given such extended reviews to such works as Wigmore on Evidence, Hughes on Procedure and Gregory's Forms for Common Law Declarations.

We have now before us a work of the same character and of equal importance except for the fact that it is local in its discussion and purposes to the state of Missouri. We refer to a work just published, entitled Missouri Practice in Civil Cases in the Circuit Courts, by Hon. Eugene McQuillin, an author of national reputation, of whose work entitled, Instructions to Juries in Civil Cases, we had so much to say in a previous volume by way of favorable comment. It might seem to some lawyers that a work on practice must necessarily be merely a compilation of technical and arbitrary requirements, based upon no general principle and having no particular logical connection with each other. While in some special instances this may be true yet in many others, and the most important instances, the rules of practice are based on the oldest maxims of antiquity and follow each other in logical sequence; and where they are expressed in the form of a code as they are in Missouri; they do not for that reason become arbitrary requirements; in such event the legislature merely gives cumulative expression to principles which have always existed and which the courts would have enforced independent of legislative action.

Mr. McQuillin's work on Missouri Practice is divided, first, into five great subdivisions, to-wit: I. The Courts and Their Officers. II. The Action. III. Ordinary Proceedings. IV. Special Proceedings. V. Practice Forms. It is observed therefore that at the very beginning the author has conceived of a very accurate and a very comprehensive view of the general subject of practice.

Part I. treats of the Judicial Department, its establishment, its divisions into apppallate and trial jurisdictions, of the nature, powers and duties of courts of record and of the officers thereof, including the judge, the clerk, the sheriff and the attorney of record. Mr. McQuillin in this subdivision of his work presents a very concise, yet withal comprehensive view of our great Anglo-Saxon system of judicial procedure as it is exemplified in the jurisprudence of Missouri. One who can arise above mere details in the perusal of this part of the work is thrown into an ecstacy of admiration as he contemplates the wonderful system of judicial establishment that has come down to us from the common law of England and which is one of our richest heritages, a system whose checks and balances are so delicately adjusted that under its operation injustice could never be inflicted except when handled by some bungler who does not understand its mechanism and who, under the influence of an "exaggerated ego," is intent upon doing things in his own way, with the plausible excuse so often given by superficial judges, that their deviation from established methods of procedure is "in furtherance of justice in the particular case."

Part II. of this work treats of the action itself; discussing its nature and form; the parties to it, both plaintiff and defendant and whether *sui juris* or *non sui juris;* its venue; the process that attends its initiation and the service of such process; appearances in response to process; changes of venue and removal to federal jurisdictions; the joinder of causes of action and the consolidation of suits; and the limitation of time placed both at common law by prescription and by the statute of limitations on the bringing of the various causes of action permitted by law to be brought. Again, we are led to observe that the very simplicity of this arrangement emphasized the fact that procedure is a science; indeed, a careful study of its various elements will disclose a more beautiful harmony where so often appears chaos and confusion.

Part III. brings us a step further into the heat of battle. It is entitled Ordinary Proceedings. It continues the process of litigation past the initial stage, the arrangement of the competing armies, into the actual conflict, with a view first of the nature of the preliminary skirmishes, such as pleas in abatement, abatement and revival of actions, continuances, procuring attendance of witnesses and written evidence under the various modes of subpœna process, and depositions. Then the author carries us into the trial itself, the heat of the battle, treating of preliminary motions, the selection of the jury, opening and closing the case, examination of witnesses, their competency and confidential relations; the introduction of evidence, its competency, admissibility and relevancy and whether parol or written; objections and exceptions of counsel; rulings of the court; the motions for verdict on the evidence and non-suit; the instructions; and final argument. With the smoke of actual battle over the author leads to a view of the final proceedings including the verdict, whether by referee, court or jury; the judgment, motions for new trial and in arrest of judgment, new trial when granted or bills of exception when not granted; appeals and final mandates; taxation of costs and executions, including exemptions and judicial sales. Could any thing be said to proceed more logically and more orderly than a trial under this arrangement. Is not every step a necessity? Indeed, the author shows the importance of each of these steps so thoroughly that a lawyer could hardly err therein.

Part IV. treats of those special proceedings which the law has adopted from time to time to meet special situations. It is marvelous to note how elastic the law is in its ability to meet the most difficult and unusual situations. Proceeding on the maxim that there can be no right without a remedy, the law has evolved from principles of procedure already recognized new modes of effectuating rights, whenever such rights were in danger of being defeated, if left unprotected except by remedies which in no way could match the new situation. Thus were gradually evolved the following special proceedings discussed by the author: Replevin, attachment, garnishment, ejectment, *certiorari*, injunction, *mandamus*, *quo warranto*, prohibition, divorce, dower rights, homestead, partition, *habeas corpus*, arbitration and award, assignment for benefit of creditors, receivers, eminent domain, incorporation, change of name of person or corporation, action upon mortgages, deeds of trust, liens, and official securities, and the enforcement of penalties, fines and forfeitures.

Part V. needs no comment. It supplies the illustrations, or forms for the proper exercise or manipulation of the wonderful judicial machinery so minutely described and whose operation is so carefully defined.

Altogether, it must be generally admitted that Mr. McQuillin's work is a great contribution to Missouri jurisprudence. In addition to its most accurate, logical and accessible arrangement, we have a very clear and concise expression and style together with an exhaustive citation of authority, leaving nothing to be desired by the practitioner in a work of this character.

Printed in two volumes of over 1800 pages and published by the Gilbert Book Company, St. Louis, Mo.

BOOKS RECEIVED.

The Law of Homicide. By Francis Wharton, LL. D., author of "A Treatise on the Criminal Law of the United States," "A Treatise on the Conflict of Laws," etc. Third Edition. By Frank H. Bowlby, of the Publishers' Editorial Staff. Rochester, N. Y. The Lawyers' Co-operative Publishing Company. 1907. Buckram. Price $7.50. Review will follow.

The Preparation and Contest of Wills, with plans of and extracts from important wills. By Daniel S. Remsen, of the New York Bar. Author of "Intestate Succession in New York." New York. Baker, Voorhis & Company. Buckram. Price $6.35. Review will follow.

The American State Reports, containing the Cases of General Value and Authority subsequent to those contained in the "American Decisions" and the "American Reports," decided in the courts of last resort of the several states. Selected, Reported and Annotated, by A. C. Freeman. Volume 111. San Francisco. Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1907. Review will follow.

HUMOR OF THE LAW.

"My client acted boldly," said the counsellor. "He saw the storm brewing in the distance, but he was not dismayed. He took the bull by the horns, and had him indicted for perjury."

Congressman Joseph T. Robinson of Arkansas tells of an old negro who was charged with having stolen a hog. The facts were all against him. He had no counsel, and when the Judge asked him if he wanted a lawyer assigned to defend him, he declared that he did not.

"But you are entitled to a lawyer," the court explained, "and you might as well have the benefit of his services."

"Yoah Honor would jes gimme some cheap white trash lawyer," the old darkey replied, "and he wouldn't do me no good. If it's jes de same to yoah Honor, I'd ruther depen' on de ign'rance ob de court."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ADOPTION—Consideration.—A contract of adoption held unenforceable for want of consideration and not to preclude the adopter from disinheriting the adopted child by will.—Fugate v. Allen, Mo., 95 S. W. Rep. 980.

2. ADVERSE POSSESSION—Elements and Proof.—To establish title by adverse possession, the claimants must show a hostile possession under claim of right, for 10 years, actual, exclusive, open, notorious, and continuous.—McCreary v. Jackson Lumber Co., Ala., 41 So. Rep. 822.

3. ADVERSE POSSESSION—Tacking.—Where land is claimed by adverse possession of claimant and his prior successive grantees, a continuous possession must be proved.—Hoyle v. Mann, Ala., 41 So. Rep. 885.

4. BENEFIT SOCIETIES—Assessments.—In an action on a benefit certificate, a defense that an assessment authorized by the by-laws had not been paid cannot be made without setting up at least the substance of the laws.—Johnson v. Sovereign Camp, Woodmen of the World, Mo., 95 S. W. Rep. 951.

5. BENEFIT SOCIETIES—Who May Be Beneficiaries.—The statute of a state wherein a foreign beneficial association is permitted to do business controls as to who may be beneficiaries in cases originating in such state.—Dennis v. Modern Brotherhood of America, Mo., 95 S. W. Rep. 967.

6. BILLS AND NOTES—Acceptance.—Retention by defendant railroad of orders drawn on it by its employees in favor of plaintiff for board for an unreasonable time held not to render it liable thereon as a matter of law.—St. Louis & S. W. Ry. Co. v. James, Ark., 95 S. W. Rep. 804.

7. BILLS AND NOTES—Execution and Acceptance.—Execution and acceptance of drafts by executrix in her representative capacity held established under the statute when they were offered and introduced in evidence in an action thereon against her.—Ellis v. Marshall Car Wheel & Foundry Co., Tex., 95 S. W. Rep. 689.

8. BROKERS—Personal Liability.—A broker contracting for a disclosed principal is not personally liable on the contract, but, if the principal is not disclosed, the broker is personally liable.—Drake v. Pope, Ark., 95 S. W. Rep. 774.

9. CANCELLATION OF INSTRUMENTS—Fraud.—In order to support a decree rescinding or canceling a lease for fraud, the evidence must create more than a mere probability of the truth of the charge of fraud.—Smith v. Collins, Ala., 41 So. Rep. 825.

10. CANCELLATION OF INSTRUMENTS—Pleading and Proof.—Where one seeks a cancellation of a conveyance because induced by fraudulent representations made by the grantee, only, such representations as are alleged and relied on can be considered.—White v. White, Tex., 95 S. W. Rep. 733.

11. CARRIERS—Action for Loss of Goods.—A suit on a transportation contract is properly brought in the name of the consignor, irrespective of whether he is the owner of the goods.—Ross v. Chicago, R. I. & P. Ry. Co., Mo., 95 S. W. Rep. 977.

12. CARRIERS—Ejection of Passenger.—In an action for ejection of passenger, instructions held not ground for reversal because of indefiniteness, where it was not shown that they were not cured by other instructions or by the evidence.—Dobbins v. Little Rock Ry. & Electric Co., Ark., 95 S. W. Rep. 794.

13. CARRIERS—Exemption from Liability for Injury by Robbers.—A mere depredator held not a robber within a bill of lading exempting a carrier from liability for injury to a shipment caused by "robbery."—Louisville & N. R. Co. v. Dunlap, Ala., 41 So. Rep. 826.

14. CARRIERS—Refusal to Accept Shipment.—A railroad, refusing for a justifiable reason to accept a shipment of freight, held under no obligation to push at the shipper's request the cars containing the shipment to a platform near its track for unloading.—Gray v. Wabash R. Co., Mo., 95 S. W. Rep. 983.

15. CONSTITUTIONAL LAW—Due Process of Law.—Acts 29th Leg., p. 128, ch. 90, authorizing the confiscation of fish held without permit, held not void as class legislation.—Raymond v. Kibbs, Tex., 95 S. W. Rep. 727.

16. CONSTITUTIONAL LAW—Life Insurance. — Rev. St. 1899, § 8012, relating to damages and attorney's fees in actions on policies of insurance, held not unconstitutional.—Keller v. Home Life Ins. Co., Mo., 95 S W. Rep. 903.

17. CONSTITUTIONAL LAW—Obligation of Contracts — Acts 27th Leg., p. 6, ch. 4, § 11, held not unconstitutional as impairing the obligation of contracts evidenced by the provisions of the confirmation act of 1852.—Sullivan v. State, Tex., 95 S. W. Rep. 645.

18. CORPORATIONS—Action by Creditors on Unpaid Stock.—In an action by creditors of a corporation to recover an alleged unpaid stock subscription, limitations held not to run until judgment and return of *nulla bona* against the corporation.—Montgomery Iron Works v. Roman, Ala , 41 So. Rep. 811.

19. CRIMINAL EVIDENCE—Motion to Strike.—The testimony should not be stricken out on the ground that it is not sufficient proof of what was intended to be proved by the party introducing it.—Maloy v. State, Fla., 41 So. Rep. 791.

20 CRIMINAL LAW—Sentence. — Where the penalty prescribed is imprisonment in the penitentiary or a money fine, a primary sentence of imprisonment in the county jail is unauthorized.—Irvin v. State, Fla., 41 So. Rep. 785.

21. CRIMINAL TRIAL—Continuance.—It was not error for the court to refuse to delay the trial of a criminal case and issue an attachment for a witness who was not shown at the time to be within the jurisdiction of the court.—Gaines v. State, Ala., 41 So. Rep. 865.

22. CRIMINAL TRIAL—Trespass.—In a prosecution for trespass, after warning the admission of evidence that after prosecutor closed up the roadway in question he cut a new roadway which was used to reach the same points to which the old road led was not error.—Cross v. State, Ala., 41 So. Rep. 875.

23. DEATH—Emancipation of Minor.—Emancipation of a minor held no defense to an action for his death under Rev. St. 1899, § 2864.—Matlock v. Williamsville, G. & St. L. Ry. Co., Mo , 95 S. W. Rep. 849.

24. ELECTION OF REMEDIES—Knowledge of Facts.—Ignorance of an attorney of facts justifying the rescission of a sale for fraud when he brought attachment to recover, the price held not to obviate the effect of such action as an election of remedies and an affirmance of the sale.—Baker v. Brown Shoe Co., Ark., 95 S. W. Rep. 808.

25. EMINENT DOMAIN—Condemnation of Railroad Right of Way. — Railroad company attempting to condemn land for railroad from Kansas City to Swope Park held to have burden of showing that Swope Park is on chartered route to Lees Summit.—Kansas City Interurban Ry. v. Davis, Mo., 95 S. W. Rep. 881.

26. EQUITY—"Clean Hands."—Lessees of turpentine land, having broken their lease, held not entitled to maintain a bill against the lessors for trespass in cutting boxed trees for lumber.—Ashe-Carson Co. v. Bonifay, Ala., 41 So. Rep. 816.

27. EVIDENCE—Opinion Evidence.—In an action for injuries to a brakeman while between cars endeavoring to couple them, it was proper to permit plaintiff's superintendent to testify that the cars could have been coupled without plaintiff going between them.—Huggins v. Southern Ry. Co., Ala., 41 So. Rep. 856.

28. EVIDENCE—Written Contracts.—Where there are two contracts it is competent to show by parol that they relate to one and the same transaction.—Rock Island Sash & Door Works v. Moore & Handley Hardware Co., Ala., 41 So. Rep. 806

29. EXECUTION—Proceedings by Claimant.—Evidence that, when one gave credit for which he afterwards obtained judgment under which he levied execution, he did not know claimant was asserting title to the horse on which execution was levied, held immaterial.—Baker v. Drake, Tex., 95 S. W. Rep. 845.

30. EXECUTORS AND ADMINISTRATORS—Stock in Foreign Corporation.—A certificate of stock in a foreign corporation, held in this state, is but evidence of ownership and not property, which can be made the basis of an administration in this state.—Richardson v. Bush, Mo., 95 S. W. Rep. 894.

31. FRAUD—Presumed Knowledge of Corporation President.—In an action for false representations made by the president of a corporation by which plaintiff was induced to purchase stock therein, it was unnecessary to prove that defendant had actual knowledge of the falsity of the representations.—Collins v. Chipman, Tex., 95 S. W. Rep. 666.

32. FRAUD—Sufficiency of Petition.—In an action for fraudulent representations inducing plaintiff to buy corporate stock, the petition held not defective in its allegations as to what representations were relied on by plaintiff.—Collins v. Chipman, Tex., 95 S. W. Rep. 666.

33. HOMICIDE—Assault with Intent to Kill.—In a prosecution under Rev. St., § 791, for having cut another with a dangerous weapon with intent to murder, evidence that the weapon was a razor held inadmissible though it was not so alleged in the indictment —State v. Stewart, La., 41 So. Rep. 798.

34. HOMICIDE—Evidence.—In a prosecution for homicide, testimony showing a personal feeling between the accused and the deceased and disclosing a motive for the crime is admissible.—Maloy v. State, Fla., 41 So. Rep. 791.

35. HOMICIDE—Self-Defense. — In a prosecution for assault with intent to kill, an instruction that, if defendant was assaulted while at the home of another on invitation, he was not bound to retreat before striking in self defense, held properly refused.—Dawson v. State, Ala., 41 So. Rep. 803.

36. INDICTMENT AND INFORMATION—Duplicity.—When a statute makes either of two distinct acts connected with the same general offense, and subject to the same punishment, indictable as distinct crimes, they may be coupled in one count.—Irvin v. State, Fla., 41 So. Rep. 785.

37. INJUNCTION—Affidavits in Support of Bill.—In a suit for an injunction, affidavits are admissible in support of the allegations of the bill in cases of waste and where irreparable injury might ensue if the injunction was not granted.—Webster v. De Bardeleben, Ala., 41 So. Rep. 831.

38. INSANE PERSONS—Sale of Ward's Property.—Until a judicial sale of a ward's property under order of court has been confirmed by the court it is insufficient to confer rights on the purchaser.—Montgomery v. Perryman & Co., Ala., 41 So. Rep. 888.

39. INTERNAL REVENUE—Enforcement of Tax.—Property seized and sold by a collector in the enforcement of the internal revenue laws cannot be replevied from the purchasers by the former owner under process from a state court, the remedy for a wrongful seizure given by the statute being exclusive.—Allen v. Sheridan, U. S. C. C., E. D. Mo., 145 Fed. Rep. 963.

40. JUDGMENT—Conformity to Pleadings.—Where the petition in an election contest attacked a vote on the ground that the voter had not paid his poll tax, the court had no authority to declare the vote illegal because the voter lived in another precinct.—Bigham v. Clubb, Tex., 95 S. W. Rep. 675.

41. JUDGMENT—Final Decree.—A final decree in the probate court for petition, whether in kind or by sale, held conclusive until reversed on appeal, excluding equity jurisdiction in the absence of special ground for interposition of equity.—Finch v. Smith, Ala., 41 So. Rep. 819.

42. JUDGMENT — Splitting Cause of Action. — Where plaintiffs contracted for the transportation of a herd of cattle at the same time, they were not entitled to split up their demand for damages for any delay in furnishing cars.—Texas & P. R. Co. v. Scoggin & Brown, Tex., 95 S. W. Rep. 651.

43. LANDLORD AND TENANT—Consideration.—Inadequacy of consideration is not of itself a sufficient ground for canceling a lease unless it is so gross that it shocks the conscience and furnishes satisfactory evidence of fraud.—Smith v. Collins, Ala., 41 So. Rep. 825.

44. LIFE INSURANCE—Application for Insurance.—Declarations made by an applicant for insurance to the medical examiner and contained in the application for insurance held not warranties under Rev. St. 1899, § 7899. —Keller v. Home Life Ins. Co., Mo., 95 S. W. Rep. 903.

45. MASTER AND SERVANT—Custom Among Employees Violating Rules of Railroad.—A custom among railroad employees of violating a rule prohibiting them from going between cars to make couplings held not binding on the master unless known and acquiesced in —Huggins v. Southern Ry. Co., Ala., 41 So. Rep. 856.

46. MASTER AND SERVANT—Injury to Servant.—An employee engaged in construction work on a railway roadbed held not to assume the risk incident to the negligence of the conductor in charge of the construction train.—St. Louis, I M. & S. Ry. Co. v. Boyles, Ark., 95 S. W. Rep. 788.

47. MASTER AND SERVANT—Maintenance of Railroad.—A sawmill company using a logging road, and authorizing its employees to travel on a hand car furnished by it to their homes, held liable for proper maintenance of the road.—Arkadelphia Lumber Co. v. Smith, Ark., 95 S. W. Rep 800.

48. MUNICIPAL CORPORATIONS — Liability for School Furnishings.—Where a city had no power to execute a note binding its general revenues for the payment of school furniture, the retention and use of the furniture did not estop it from denying its liability on the note.—Cleveland School Furniture Co. v. City of Greenville, Ala., 41 So. Rep. 862.

49. MUNICIPAL CORPORATIONS—Ultra Vires Acts.—That officers of a municipal corporation, after suit brought to enjoin certain *ultra vires* acts, abandoned the scheme and revoked the orders under which it was to be performed, held no ground for the dismissal of the suit.—Gillespie v. Gibbs, Ala., 41 So. Rep. 868.

50. NEGLIGENCE—Automobile Accident.—In an action for injuries through being thrown from an automobile, plaintiff held not bound by acts of other occupants of the machine relative to the rate of speed.—Routledge v. Rambler Automobile Co., Tex., 95 S. W. Rep. 749.

51. PARTITION—Notice of Sale.—The statute regulating proceedings for the partition of a decedent's estate does not require notice to the heirs of the proceeding to sell because the estate is not capable of division.—Rye v. J. M. Guffey Petroleum Co , Tex., 95 S. W. Rep. 622.

52. PARTITION — Proceedings in Chancery. — Where property sought to be partitioned can be equally divided, but the remedy by allotment in the probate court is ineffectual, the party should proceed with a division in chancery.—Finch v. Smith, Ala., 41 So Rep. 819.

53. PRINCIPAL AND AGENT—Conveyance by Power of Attorney.—The heirs of adecedent held to acquire no title under a deed as against a deed executed by the grantor's attorney under a power of attorney to the decedent in his lifetime —Rye v. J. M. Guffey Petroleum Co., Tex., 95 S. W Rep 622.

54. PRINCIPAL AND AGENT — Power of Attorney.—A power of attorney authorizing an attorney to convey a wife's separate estate held not revoked by the death of the husband —Skirvin v. O'Brien, Tex., 95 S. W. Rep. 696.

55. RAILROADS—Abandonment of Location.—Railroad corporation held to have no right to willfully abandon any part of chartered route, notwithstanding Rev. St. 1899, § 1161.—Kansas City Interurban Ry. v. Davis, Mo., 95 S. W. Rep. 881.

56. RAILROADS—Ejection of Passenger.—Persons entering train held entitled to be treated as passenger until he was notified that his ticket was not good and he refused to pay his fare.—Gulf, C. & S. F. Ry. Co. v. Bunn, Tex., 85 9. W. Rep. 640.

57. RELEASE—Consideration.—A release of claims for a personal injury held supported by a sufficient consideration and binding, in the absence of fraud or mistake.—Strode v. St. Louis Transit Co., Mo., 95 S. W. Rep. 851.

58. RELEASE—Receipts.—A receipt for damages sustained by the construction of a sewer held a discharge of all claims plaintiff had at the time against defendants except damages caused by stock to crops which were brought about by defendants' negligence.—Murphy v. Black & Laird, Ala., 41 So. Rep. 877.

59. REWARDS — Offender's Conviction.—A reward offered by a railroad company, held for the arrest and conviction of a person charged with the offense defined by Kirby's Dig. § 1999, and hence the record of a conviction of a person for such offense was admissible and *prima facie* evidence of guilt in an action for the reward. —Arkansas Southwestern Ry. Co. v. Dickinson, Ark., 95 S. W. Rep. 802.

60. SALES—Rights of Parties Before Delivery.—A contract for the sale of personalty to be acquired by the seller, held not to transfer to the buyer either the legal or equitable title until delivery.—Block v. Shaw, Ark., 95 S. W. Rep. 806.

61. SPECIFIC PERFORMANCE—Purchase Price.—Where, in a suit for specific performance, defendant claimed a balance of the price unpaid, the case should be referred to the register to ascertain any balance.—Falkner v. Hudson, Ala., 41 So. Rep. 844.

62. STATUTES—Restrictions in Title.—When the subject expressed in a title is restricted, only those provisions fairly included in such restricted subject and matter properly connected therewith can legally be incorporated in the body of the act —*Ex parte* Knight, Fla., 41 So. Rep. 786.

63. STREET RAILROADS—Defective Transfer.—One presenting a transfer on a street car in seasonable time had it been properly punched held a passenger.—Little Rock Railway & Electric Co. v. Goerner, Ark., 95 S. W. Rep. 1007.

64. STREET RAILROADS — Stop, Look and Listen.—Where a traveler without looking turns onto the track so suddenly that it is impossible for the motorman to check his car, the street car company is not liable for the consequences.—Birmingham Ry., Light & Power Co. v. Clarke, Ala., 41 So. Rep. 829.

65. STREET RAILROADS—Wrongful Death.—In an action against a street railroad for wrongful death occasioned by a collision between defendant's car and decedent's wagon, evidence held to show contributory negligence on decedent's part.—Higgins v. St. Louis & S. Ry. Co., Mo., 95 S. W. Rep. 863.

66. TRESPASS—Removal of Personalty.—Where in trespass for the taking of plaintiff's furniture she contended that a contract of conditional sale was executed to secure a loan, evidence that defendants were pawnbrokers held admissible.—Terry v. Williams, Ala., 41 So Rep. 804.

67. TRIAL—Reading Evidence to Jury.—Where receipts had been introduced in evidence, it was competent for counsel to read them to the jury for the first time on the argument.—Terry v. Williams, Ala., 41 So. Rep 804.

68. TROVER AND CONVERSION—Liability for Conversion.—A petition by a public administrator to recover certificates of stock in a foreign corporation held by defendant, a resident of Missouri, held not to show a state of facts on which defendant would be liable as for conversion.—Richardson v. Busch, Mo., 95 S. W. Rep. 894.

69. TRUSTS — Express Trust in Land.—A contemporaneous parol agreement made at the time of the execution (and delivery of a deed absolute upon its face that the vendee will hold the property in trust for a certain person is not within the statute of frauds.—Insurance Co. of Tennessee v. Waller, Tenn., 95 S. W. Rep. 811.

70. WILLS—Life Estate.—A power of disposition in fee added to a life estate is not repugnant to the life estate, or to the remainder over.—Grace v. Perry, Mo., 95 S. W. Rep. 875.